No. 83-1943

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ROBERT M. CAVANAUGH, and
MARTHA E. CAVANAUGH,

Petitioners,

v.

WESTERN MARYLAND RAILWAY COMPANY
AND BALTIMORE AND OHIO
RAILROAD COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONSE TO MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

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SUMMARY OF ARGUMENT

This Court should deny the Motion for Leave to File Brief *Amicus Curiae* which was filed herein by the United Transportation Union (Union). It is the position of the respondents, Western Maryland Railway Company and Baltimore and Ohio Railroad Company[1] that the Motion should be denied upon the following grounds:

[1]A list of the parent companies, subsidiaries, and affiliates of the respondent railroads may be found in the Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit which was previously filed herein.

(a) The first portion of the proposed brief merely restates the arguments set forth in the Petition for Certiorari and therefore will add nothing to this Court's understanding of this case; and

(b) The pre-emption issue presented in the second section of the proposed brief was neither raised nor decided below, and in any event, the movant's argument on that issue is without merit.

ARGUMENT

Section I of the proposed brief *amicus curiae* merely rehashes the arguments set forth in the Petition for Certiorari. There is no new argument or precedent advanced therein which is not set forth either in the Petition or in the dissent filed in the Court below. Because the arguments set forth in Section I have already been addressed in the respondents' Brief in Opposition to the Petition for Writ of Certiorari, the respondents will not discuss the matters set forth in Section I further except to point out that duplicative argument advanced by a proposed *amicus curiae* can be of little help to this Court in deciding whether to grant certiorari in this case.

The Union has advanced in Section II of the proposed brief an argument which was not raised or decided either by the District Court or the Fourth Circuit Court of Appeals. Section II asserts, for the first time, that the railroads' state law property damage claim against petitioner Robert Cavanaugh, which was upheld by the Fourth Circuit, is pre-empted by the Railway Labor Act. 45 U.S.C. §151, *et seq.* It has often been held that this Court sits to review decisions of the lower Courts and will not decide questions not raised or resolved below, absent extraordinary circumstances. *Youakim v. Miller*, 425 U.S. 231 (1976); *California v. Taylor*, 353 U.S. 553 (1957); *Lawn v. United States*, 355 U.S. 339 (1957); *Duignan v. United States*, 274 U.S. 195 (1927); and others. No such extraordinary circumstances are present in this case. Nothing prevented the petitioners from raising and developing the pre-emption issue below, and no constitutional or other substantial rights of petitioners will be prejudiced by the refusal of this Court to consider the matter. For this reason alone, this Court should refuse to grant the motion for leave to file the *Amicus Curiae* brief.

A second, and more important, reason for denying the motion is that the pre-emption argument advanced by the Union cannot be supported. In its proposed brief, the Union takes the position that the railroads' state law property damage counterclaim is a "minor dispute" as that term is used in cases decided under the Railway Labor Act (R.L.A.). 45 U.S.C. §151 *et seq*. The Union correctly points out that the grievance and arbitration procedure provided by the Railway Labor Act is the exclusive mechanism for resolving minor disputes between employers and employees in the railway industry. (Proposed Brief, p. 16). The respondent railroads concede that *if* the Union were correct in its characterization of the property damage claim as a "minor dispute," that claim could not be litigated as a counterclaim to the petitioners' Federal Employers' Liability Act suit now pending in the Federal District Court for the Northern District of West Virginia. Rather, minor disputes must be litigated through the grievance and arbitration procedure and are ultimately within the exclusive jurisdiction of the National Railroad Adjustment Board. However, the Union has cited no case holding that such a state law property damage claim filed by an employer against a negligent employee is a minor dispute. Furthermore, examination of the Act itself and of the applicable case law yields the inescapable conclusion that the railroads' state law property damage claim cannot be considered to be a minor dispute and thus is not pre-empted by R.L.A.

The Union's argument centers chiefly around the leading case of *Elgin, Joliet & Eastern Railway Co. v. Burley*, 326 U.S. 711 (1945). *Elgin* is the landmark case interpreting the dispute resolution mechanisms of the Railway Labor Act. In a much cited passage, the *Elgin* case explains the difference between major disputes and minor disputes:

> The statute first marks the distinction in §2, which states as among the Act's five general purposes: "(4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all *disputes growing out of grievances or*

out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." The two sorts of dispute are sharply distinguished, though there are points of common treatment. Nevertheless, it is clear from the Act itself, from the history of railway labor disputes and from the legislative history of the various statutes which have dealt with them, that Congress has drawn major lines of difference between the two classes of controversy.

The first relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.

The second class, however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation *or to an omitted case. In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement,* e.g., claims on account of personal injuries. In either case the claim is to rights accrued, not merely to have new ones created for the future. (emphasis added). 325 U.S. at 722-723.

The Union concedes that the property damage claim asserted by the railroads in this case is not a major dispute but rather claims instead that it is a minor dispute. The Union also concedes that the claim in question does not involve the meaning or proper application of a provision of the applicable collective bargaining agreement. Rather, the Union contends that the claim at issue

herein falls within the "omitted case" category. The Union cites no case interpreting the phrase "omitted case." It relies instead on the contention that the claim herein is "founded upon some incident of the employment relation" as that phrase is used in *Elgin*. 325 U.S. at 723. Plainly, this contention will not hold up under close scrutiny.

To understand the meaning of the reference to omitted cases in *Elgin*, it is necessary to remember that the focus of the opinion was upon distinguishing major disputes from minor disputes and not on distinguishing claims within the Act from claims outside the sphere of the Act. Taken literally, the language in *Elgin* seems to mean that a minor dispute is anything covered by the collective bargaining agreement *or* anything *not* covered by the collective bargaining agreement. It is obvious that this construction is nonsensical. The Court in *Elgin* cannot have meant that any controversy either arising from a collective bargaining contract or omitted from it is pre-empted by R.L.A. since that would necessarily encompass every dispute in the universe of legal controversy. A more logical explanation for the inclusion of the phrase "omitted case" within the definition of minor disputes in *Elgin* is that certain matters, particularly disputes over past practices or over the scope of residual managerial prerogative, by their nature are matters that may not be covered by specific language in the agreement. An examination of the case law on this point clearly demonstrates that a proper construction of the phrase "omitted case" is that it refers to matters, such as disputes over past practices, which are very similar to disputes commonly arising out of the language of collective bargaining agreements but which, for one reason or another have been omitted from the particular contract in issue.

For example, in *Airline Flight Attendants v. Texas International Airlines, Inc.*, 411 F. Supp. 954 (S.D.Tex. 1976), the airlines began unilaterally cancelling and deleting certain flights and rerouting others. The flight attendants sought injunctive relief which the Court held could only be granted if the dispute were major. To resolve the issue, the Court examined the language quoted from the *Elgin* case:

> From this definition two types of minor disputes can be distinguished. The first type of minor dispute relates

> to the meaning or proper application of a particular provision of an existing collective agreement with reference to a specific situation. The second type of minor dispute involves differences arising incidentally in the course of employment. Not being covered by any express provision of the collective agreement, differences of this type are called "omitted cases." 411 F. Supp. at 959.

The Court then found that the dispute concerning cancelling and rerouting flights was arguably covered by the express provisions of the contract. However, the Court also held in the alternative that even if the dispute was not covered by express provisions of the agreement, it was "an 'omitted case' concerning a dispute that had arisen incidentally in the course of employment and that merely involved the scope of managerial prerogative impliedly left with the Airlines by the collective agreement." 411 F. Supp. at 961.

In the case at bar, the railroads' state law property damage claim cannot be said to be *incidental* to Cavanaugh's employment relationship. If a total stranger to either railroad had negligently damaged railroad property, as Cavanaugh did, there could be no argument that the claim was pre-empted. The fact that Cavanaugh may have been an employee of one or both of the railroads at the time he committed the tort does not make the railroads' chose in action an *incident* of the contractual relationship between Cavanaugh and his employer. Unlike the claim of the flight attendants in the *Texas International* case, the railroads' claim here is not a dispute over working conditions or any other incident of the employment relationship. Therefore it is not a minor dispute and is not pre-empted.

Similarly, in *Portland Terminal Railroad Company v. United Transportation Union,* 97 Lab. Cas. (CCH) §10,259 at 18,288 (D.C.Or. 1982), the issue also concerned whether a dispute was pre-empted under the "omitted case" doctrine. In *Portland,* the Union objected to a new company policy which permitted the company's parent and another railroad to pass through the company's yard using the parent's own switching crews, thus bypassing the daughter company's crews. In *Portland,* the Court affirmed a special

master's opinion that the question was a minor dispute within the omitted case classification used in *Elgin*. The opinion quotes some very interesting testimony given by an official of the company as being crucial to the resolution of the case:

Q. [Court]: This dispute on this interchange business, this dispute in one sense of the word kind of falls between the cracks of these various agreements, doesn't it?

A. [Manager]: Yes.

Q. [Court]: It's the kind of thing that when you folks sat down, you and the folks from the union sat down in 1972 and did your arm wrestling and whatever else you do when you negotiate, it was an area that you didn't put a specific section or clause or phrase about?

A. [Manager]: I don't quite follow what you mean.

Q. (Court): Well, this isn't covered in specific terms in any of your documents?

A. [Manager]: You are talking about the new inaugurated yard-to-yard? No, it is not, Your Honor.

Q. [Court]: And what it comes down to, of course, is that you folks — that is the railroad says, well, it's not prohibited. And what the union folks are saying is, it's not mentioned, and therefore, it's not permitted. That is where you really start to focus on this issue?

A. [Manager]: Right.

Q. [Court]: It's the kind of thing where if you had thought about it, you and the union would have negotiated it?

A. [Manager]: Undoubtedly.

97 Lab. Cas. (CCH) at 18,292.

This testimony, which was so helpful in determining that the dispute in *Portland* was pre-empted as a minor dispute of the omitted case type provides a good contrast to the claim at issue in this case. The respondent railroads' property damage claim is *not* the type of matter which would have been negotiated in the labor agreement if the parties had thought about it. It is *not* a matter which simply "fell through the cracks." It is *not* an issue concerning past practice or residual management prerogative. Rather, it is an entirely separate chose in action arising from state tort law and not an incident of the petitioner's employment relationship. It was not negotiated, nor is it an item that would have been negotiated because it already existed as a creature of law.

In addition to these cases defining the "omitted case" classification of *Elgin,* it is also helpful to examine the text of the Railway Labor Act itself to determine what matters it was intended to cover. Perusal of the statute reveals that the phrase "rates of pay, rules, or working conditions" is used time and again to describe the statute's central concerns. For example, 45 U.S.C. §151(a) states that a general purpose of the act is "to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions." The fact that the railroads' state law property damage claim has no connection whatsoever with "rates of pay, rules, or working conditions" is additional evidence that this claim is not the type of dispute which was intended to be covered by the act.

It is also important to note that nothing in our national labor policy requires pre-emption of the railroads' state law claim. That policy favors pre-emption of state law causes of action which are so closely tied to the employment relationship (e.g., disputes over rates of pay, rules, or working conditions) that they are more properly litigated before the National Labor Adjustment Board which has special expertise in such matters. The claim at issue herein, a state law remedy for negligent injury to personalty, is not within that special expertise. Rather, it is the type of issue that is within the special expertise of the courts.

Being unable to cite a single opinion holding a state law property damage action to be a minor dispute within the "omitted case" classification, the Union resorts to citing a number of cases in which

courts have rejected *employees'* attempts to recast their grievances against their employers as state law tort claims in an effort to avoid the pre-emption effect of the Railway Labor Act. (See Proposed Brief, pp. 17-18). Close examination of each of these cases, however, indicates that in each case, the alleged state law tort or contract claim was actually inextricably intertwined with the employment relationship, not just the result of an act or omission which happened to occur during employment. It is also clear that in each case, the court attempting to decide the claim would have necessarily become involved in interpreting and applying the collective bargaining agreement. These factors simply are not present in this case; hence the cases cited are inapposite.

For example, the Union cites *Andrews v. Louisville & Nashville Railroad Co.,* 406 U.S. 320 (1972) which involved an employee's claim that he was wrongfully discharged. The Court in *Andrews* noted that the very concept of "wrongful discharge" implied a breach of the employee's collective bargaining agreement. 406 U.S. at 324. It is hard to imagine any dispute more closely tied to an employment relationship and to contractual grievance procedures than a controversy over a termination of the relationship. Of the cases cited by the Union, *Jackson v. Consolidated Rail Corp.,* 717 F.2d 1045 (7th Cir. 1983); *Choate v. Louisville & Nashville Railroad Co.,* 715 F. 2d 369 (7th Cir. 1983); *Magnuson v. Burlington Northern Inc.,* 576 F.2d 1367 (9th Cir. 1978) and *Sharkey v. Penn Central Transportation Co.,* 493 F.2d 685 (2nd Cir. 1974) all involved discharges. These cases stand for the proposition that disputes by employees concerning the termination of their employment relationships naturally are cases where "the claim is founded upon some incident of the employment relation" as that phrase is used in the definition of a minor dispute in *Elgin.* 325 U.S. at 723. They offer no support for the Union's assertion that the state law property damage claim in this case is a minor dispute.

The remaining cases cited by the union are equally inapposite since they all are inextricably intertwined with the employment relationship. For example, *de la Rosa Sanchez v. Eastern Airlines, Inc.,* 574 F.2d 29 (1st Cir. 1978) involved a pilot's assertion that he had not received all of the disability pension payments to which he was entitled. Patently, this was a claim incidental to employment and

obviously was a dispute which would involve the Court in interpreting the contract. In *Majors v. U.S. Air, Inc.*, 525 F.Supp. 853 (D.Md. 1981), the dispute concerned the actions of supervisors in questioning the employee as to whether he had committed a theft on the job. Disputes concerning actions of supervisors in investigating rule violations or imposing discipline for violations are classic grievances that clearly should be resolved through the arbitration process. Of course, no such grievable matter is involved in the railroads' property damage claim herein. Similarly, the cited case of *Carson v. Southern Railway Co.*, 494 F.Supp. 1104 (D.S.C. 1979) also arose from an alleged violation of a disciplinary rule. The plaintiff therein claimed he had been defamed because a supervisor charged him with a violation of a rule against drinking on duty. This too is a classic grievance situation which is wholly unlike the claim at issue herein. And finally, the case of *Louisville & Nashville Railroad Co. v. Marshall,* 586 S.W.2d 274 (Ky.App. 1979), the employee sued on the theory that a poor performance evaluation was defamatory. The case gives no surcease to the petitioners because it too involved a matter which, unlike the claim herein, was clearly an incident of the employment relationship. Thus, it can be seen that none of these cases cited by the Union is of the slightest precedential value on the issue of whether the railroads' chose in action is pre-empted by R.L.A.

The claim filed by the railroads does not arise from any incident of an employment relationship. It is merely a fortuity that the property damage was caused by the negligence of an employee. Even more significantly, the litigation of the property damage claim will not involve any interpretation of a collective bargaining agreement and will not be within the peculiar expertise of the Adjustment Board. Rather, this is the type of issue which is constantly being litigated in federal district courts. West Virginia tort law governs the claim, and there is no reason in the Railway Labor Act itself, in the case law, or in our national labor policy to take this claim out of the jurisdiction of the district court. The claim therefore cannot be considered to be pre-empted by the Railway Labor Act.

CONCLUSION

Because the arguments advanced in the proposed brief *amicus curiae* are either duplicative of arguments already presented to the Court or are wholly meritless, the Motion for Leave to File Brief *Amicus Curiae* should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he served the foregoing response to Motion for Leave to File Brief Amicus Curiae by mailing true copies thereof by depositing the same in the United States mail, postage prepaid, at Huntington, West Virginia, on the 12th day of July, 1984, to:

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